STATE OF MICHIGAN

IN THE SUPREME COURT

JAMES WADE,

Plaintiff/Appellee,

v.

WILLIAM McCADIE, D.O. and
ST. JOSEPH HEALTH SYSTEM, INC.,
d/b/a HALE ST. JOSEPH MEDICAL CLINIC,

Defendants/Appellants.

S. C. Case No.
C.A. Case No. 317531
L.C. Case No. 13-007515-NH

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DEFENDANTS' APPLICATION FOR LEAVE TO APPEAL

NOTICE OF HEARING

NOTICE OF FILING

PROOF OF SERVICE

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STATEMENT OF QUESTIONS INVOLVED

I.

SHOULD THIS COURT SHOULD GRANT LEAVE TO CORRECT THE COURT OF APPEALS' EXPANSIVE AND ERRONEOUS INTERPRETATION OF MCL 600.2912d(3)?

Plaintiff says	"No."
Defendants say	"Yes."
The Court of Appeals says	"No."
The Trial Court says	"Yes."

II.

DID THE COURT OF APPEALS ERR IN DETERMINING THAT DEFENDANTS VIOLATED MCL 600.2912b(5)

Plaintiff says	"No."
Defendants say	"Yes."
The Court of Appeals says	"No."
The Trial Court says	"Yes."

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ORDER APPEALED FROM, RELIEF SOUGHT, JURISDICTION AND STANDARD OF REVIEW

1. Order Appealed From. The order appealed from is an Opinion of the panel majority of the Court of Appeals dated January 29, 2015, a copy of which is attached as Exhibit 1. The Dissenting Opinion is attached as Exhibit 2.

2. Relief Sought. Defendants request that the Court either 1) enter an Order vacating the Court of Appeals' decision and reinstating the judgment of the trial court or 2) grant leave to hear this important question that impacts the jurisprudence of the State.

3. Basis for Supreme Court Jurisdiction. MCR 7.302(B)(2) (significant public interest), (3) (legal principles of major significance) and (5) (the Court of Appeals decision is clearly erroneous and will cause material injustice).

4. Standard of Review. A decision to grant a motion for summary disposition is reviewed de novo. Maiden v Rozwood, 461 Mich 109, 118 (1999). This Court also reviews issues of statutory interpretation de novo. Neal v Wilkes, 470 Mich 661, 664 (2004).

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INTRODUCTION

In this medical malpractice case, the issue on appeal concerns the scope of the 91-day extension granted to a plaintiff for filing an affidavit of merit under MCL 600.2912d(3). As this Court knows, providers have a duty to provide a patient with access to "all medical records related to the claim that are in the control of the health professional or health facility" 56 days after they receive a notice of intent. MCL 600.2912b(5) (emphasis added). But the question in this case is whether a plaintiff's belief that he did not receive "all" medical records triggers the 91-day extension for a plaintiff to file an affidavit of merit under MCL 600.2912d(3).

Plaintiff thought it did and, rather than attempting to toll the statute of limitations by filing a potentially defective affidavit of merit (the amendment of which would have related back, MCR 2.118(D)), or filing a motion with the trial court seeking an extension of the deadline to file an affidavit of merit, MCL 600.2912d(2), Plaintiff waited until a month after the statute of limitations expired to file his affidavit of merit. The affidavit of merit was prepared without the aid of additional medical records; indeed, the records about which Plaintiff complains – billing records and records from 1979-1992 – are indisputably not in Defendants' possession or control. It bears repeating: Plaintiff played Russian roulette with the statute of limitation in the hopes of collaterally attacking access to records he obviously did not need to file an effective affidavit of merit.

Remarkably, Plaintiff's gamesmanship paid off in the Court of Appeals. In a divided decision, the panel majority of the Court of Appeals held that a defendant's perceived failure to provide access to "all" medical records under MCL 600.2912b(5) entitles a plaintiff to a

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91-day extension under MCL 600.2912d(3). In so doing, the majority panel erroneously interpreted §2912d(3) to require a defendant to allow access to "all" medical records, when it only requires "access to medical records." As dissenting Judge Patrick Meter made clear, this distinction makes a difference in cases like this one, where the records provided were, by Plaintiff's own admission, sufficient to prepare an effective affidavit of merit, even if there is some dispute as to whether "all" records were provided. Interestingly, in this case, there is no dispute: Defendant provided every medical record related to Plaintiff in its possession.

This Court should correct the panel majority's error. Its ruling significantly expands the circumstances under which a medical malpractice plaintiff is entitled to the 91-day extension and imposes record production obligations for defendants that were not contemplated by the Legislature. This ruling is also inconsistent with other Court of Appeals opinions involving similar facts, including a case in which Plaintiff's attorney was involved.

Defendant requests that this Court vacate the Court of Appeals Opinion and remand to the trial court to reinstate summary disposition in Defendants' favor or, in the alternative, grant leave to appeal.

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STATEMENT OF FACTS

Plaintiff seeks damages for injuries he claims he suffered due to Defendant William McCadie, D.O.'s assessment and treatment of Plaintiff's high blood pressure. Plaintiff alleges four years of malpractice by Dr. McCadie – June 2008 through July 2012 – and seeks to hold Dr. McCadie's employer, Defendant St. Joseph Health System, Inc. d/b/a Hale St. Joseph Medical Clinic, responsible under a vicarious liability theory. It is undisputed that the last date Dr. McCadie treated Plaintiff was on February 7, 2012. Defendants' Brief on Appeal, Exhibit 1, Last Entries from Plaintiff's Medical Records.

1. Defendants' Medical Records Investigation.

Plaintiff requested medical records from Defendants on April 2, 2012. Plaintiff's Appeal Brief at 1. Defendants mailed all of Plaintiff's medical records within their control to Plaintiff's counsel. Defendants' Brief on Appeal, Exhibit 2, Records Log. As the statement sent by Defendant Hale St. Joseph Medical Clinic to Plaintiff stated, "Records are complete & ready to be mailed." Exhibit 3 to Plaintiff's Appeal Brief (emphasis added).

Plaintiff filed a notice of intent on August 20, 2012. Plaintiff's Appeal Brief, Exhibit 5. The notice of intent acknowledged that Plaintiff's counsel had received the medical records Defendants sent to him, but stated he had not received billing records or laboratory results for the time period 1979 through 1992 and requested that Plaintiff's "entire chart" be provided. Id at 1.

Plaintiff's complaint was filed on February 22, 2013 without an affidavit of merit. The parties continued to communicate regarding the medical records, with Defendant agreeing to investigate whether additional records existed. Counsel for both parties even met face-to-

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face in April 2013, during which time Plaintiff's counsel examined all records in Defendants' possession. Plaintiff's Answer to Motion for Summary Disposition at 3. It was not until after that meeting that Defendants discovered that the laboratory results for 1979 through 1992 had been destroyed according to the Michigan Public Health Code's seven-year medical record retention requirement, MCL 333.16213(1), (4). Defendants' counsel sent Plaintiff's counsel a letter to this effect on May 15, 2013. It is important to note that the billing records requested by Plaintiff were also missing, because Defendants did not and do not maintain their own billing records.

Although he did not have billing records or laboratory results from 1979 through 1992, Plaintiff subsequently filed his affidavit of merit on May 24, 2013 – nearly one month after the statute of limitations indisputably expired.

2. Trial Court Proceedings.

Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(7), arguing that the action was not properly "commenced" when Plaintiff filed his complaint because it was not accompanied by an affidavit of merit. As a result, Defendants argued, the statute of limitations was not tolled and additional claims against Defendants were time-barred. The last dates of treatment in Plaintiff's medical records reflected that any remaining potentially viable dates for medical malpractice claims were not based on new or separate acts of malpractice, but rather continued adherence to a treatment plan for Plaintiff's high blood pressure.

Plaintiff asserted that Defendants did not comply with MCL 600.2912b(5) because Defendants did not supply his complete medical records or notify Plaintiff at the time they provided the records that some of them had been destroyed. Plaintiff argued that

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Defendants' alleged failure in this regard excused him from filing an affidavit of merit with his complaint pursuant to MCL 600.2912d(3).

The trial court disagreed with Plaintiff and granted Defendants' motion. In its reasoning, the trial court stated that:

> I think defendant has complied with the statute, especially considering basically the defendant being able to destroy records that are more than seven years old. Did I say that right? I mean, we have – we have a situation here where plaintiff is, I guess, asking me to find that plaintiff was excused from filing this Affidavit of Merit with the Complaint by that exception, and I just think that plaintiff has failed to show that the exception applies so, therefore, I am granting defendant's motion.

Transcript, Motion for Summary Disposition, June 3, 2013 at 23.

Plaintiff filed a motion for reconsideration, which the trial court also denied.

3. Proceedings In The Court Of Appeals.

A divided Court of Appeals reversed. As to the laboratory records Defendants destroyed pursuant to the Public Health Code, the panel majority stated:

> Plaintiff concedes that records properly destroyed in accordance with the law are not within defendants' control and are, therefore, excused from production. However, even if certain records were not within defendants' control because they had been lawfully destroyed, the reason and explanation for why they were not supplied *were* within defendants' control. Upon receiving the request for records with plaintiff's notice of intent to sue, defendants were obligated to either turn over those records or offer a timely explanation for why they were no longer available.

Opinion at 5 (emphasis added and in original).

With respect to the billing records, the panel majority relied on MCL 600.2912b(5) and held that:

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> [N]owhere in § 2912b(5) does it provide that a plaintiff be given access to medical records a *defendant* deems appropriate for a plaintiff to have in order to be able to prepare an affidavit of merit. It simply provides that within 56 days of receiving a plaintiff's notice of intent to sue 'the health professional or health facility shall allow the claimant access to *all* medical records related to the claim that are in the control of the health professional or health facility.' Although MCL 600.2912b(5) contains the phrase 'related to the claim,' defendants are not permitted to determine what is relevant, especially in the face of a specific request. Instead, a medical malpractice plaintiff is entitled to either receive or access *all* of his medical records within the defendants' control, including billing information. The trial court erroneous adopted a substantial compliance approach to excuse defendants' statutory obligation.

Id at 6 (emphasis in original).

Dissenting Judge Patrick Meter disagreed with the panel majority, explaining that the above analysis improperly allows for a plaintiff to take advantage of the extension provided in MCL 600.2912d(3) when a defendant fails to fulfill its obligations under MCL 600.2912b(5), a result the Legislature did not intend:

> Notably, the statute [MCL 600.2912d(3)] does not permit a 91-day extension for filing an affidavit of merit where a defendant fails to give a plaintiff access to *all* medical records. Rather, MC: 600.2912d(3) speaks only of the failure to 'allow access to medical records,' and it only references MCL 600.2912b(5) to the extent of involving 'the time period set forth' therein. Thus, even assuming, for purposes of argument, that defendant violated MCL 600.2912[b](5) by failing to provide *all* medical records related to the claim, the plain language of MCL 600.2912d(3) does not support the conclusion that such violation automatically result in a 91-day extension for filing an affidavit of merit. Moreover, such an interpretation would be unreasonable when read in context with the remainder of MCL 600.2912d. MCL 600.2912d(1) establishes the duty to file an affidavit of merit with the complaint and lists the required contents of the affidavit. Accordingly, it stands to reason that the Legislature intended MCL 600.2912d(3) to provide an exception to the requirement that the affidavit be filed with the complaint in cases where the plaintiff has not been given access to the

> documents *necessary to prepare an effective affidavit*. In other words, it is unreasonable to apply the 91-day extension under MCL 600.2912d(3) where the defendant has timely given the plaintiff access to medical records sufficient to execute a proper affidavit of merit, even though other records may be outstanding.

Dissenting Opinion at 4 (emphasis added and in original).

As Judge Meter pointed out, Plaintiff "was able to submit an affidavit of merit using the medical records defendants provided him before he delivered his notice of intent to sue, which began the 56-day period under MCL 600.2912b(5)," and as a result, "plaintiff was not entitled to a 91-day extension under MCL 600.2912d(3), and the trial court properly dismissed his claim as time-barred." Id.

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ARGUMENT

I.

THIS COURT SHOULD GRANT LEAVE TO CORRECT THE COURT OF APPEALS' EXPANSIVE AND ERRONEOUS INTERPRETATION OF MCL 600.2912d(3)

A. STANDARD OF REVIEW

A trial court's decision to grant summary disposition is reviewed de novo. Maiden v Rozwood, 461 Mich 109, 118 (1999). This Court also reviews issues of statutory interpretation de novo. Neal v Wilkes, 470 Mich 661, 664 (2004).

B. ARGUMENT

This Court should either enter an order vacating the panel majority's Opinion or grant leave to determine whether the remedy provided to a medical malpractice plaintiff when he claims he did not receive "all" medical records under MCL 600.2912b(5) is to grant the 91-day extension prescribed in MCL 600.2912d(3). This is decidedly what the panel majority concluded and in doing so, imposed new obligations on defendants the Legislature never intended. The result of the panel majority's ruling is significant: it now gives plaintiffs a free pass to sit on their rights, even when – as in this case – they have all of the information necessary to prepare an effective affidavit.

The goal of statutory interpretation is, as this Court has repeatedly said, "to discern the intent of the Legislature by focusing on the best indicator of that intent, the language the Legislature adopted in the statute." Cameron v Auto Club Ins Ass'n, 476 Mich 55, 60 (2006)

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overruled on other grounds by Regents of Univ of Michigan v Titan Ins Co, 487 Mich 289 (2010). Accord: Echelon Homes v Carter Lumber Co, 472 Mich 192, 196 (2005); Koontz v Ameritech Svcs, 466 Mich 304, 312 (2002); Kreiner v Fischer, 471 Mich 109, 129 (2004); Stozicki v Allied Paper Co, 464 Mich 257, 263 (2001) ("The starting point for determining the Legislature's intent is the language of the statute itself.").

In this case, the panel majority did not focus on the language of the statute at issue, MCL 600.2912d(3), which prescribes the only circumstance under which a plaintiff receives a 91-day extension to file an affidavit of merit: when a defendant "fails to allow access to medical records within the time period set forth in section 2912b(6)."[1] Instead, the panel majority concluded that this case is controlled by MCL 600.2912b(5), which requires medical malpractice defendants to give a plaintiff access to "all" medical records within 56 days of receiving a notice of intent to sue.

This is the crux of the panel majority's error. It dutifully argued the language of MCL 600.2912b(5), exclaiming that access to "all" medical records must be provided and that "medical records" includes billing records. But the panel majority glossed over an essential preliminary question – whether the 91-day exception under §2912d(3) is triggered when a defendant is accused of failing to provide access to "all" medical records, but does provide access to medical records sufficient for a plaintiff to file an effective affidavit of merit.[2] As was explained succinctly by dissenting Judge Patrick Meter, it is not.

The language of MCL 600.2912d(3) is crystal clear and not in dispute. It does not, as

[1] The statute mistakenly refers to MCL 600.2912b(6) rather than MCL 600.2912b(5).

[2] Defendants affirmatively deny that they did not give Plaintiff access to "all" medical records in their possession and control. This fact is undisputed.

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the panel majority held, permit a 91-day extension where a defendant allegedly fails to give the plaintiff access to "all" medical records. Rather, it permits an extension where no access is given. "Courts may not rewrite the plain language of the statute and substitute their own policy decisions for those already made by the Legislature." McGhee v Helsel, 262 Mich App 221, 226 (2004). Adding language to a statute violates the basic canon of statutory interpretation that Justice Antonin Scalia refers to as the "Omitted-Case Canon": "Nothing is to be added to what the text states or reasonably implies []. That is, a matter not covered is to be treated as not covered." Reading Law: The Interpretation of Legal Texts at pg. 93, 2012 Ed. So obvious is this rule that Justice Scalia says "it seems absurd to recite it." Id.

Yet, that's precisely what the panel majority did here. It inserted the word "all" into the statute in an effort to ensure that a plaintiff has access to every shred of paper associated with a patient before preparing an affidavit of merit.

This is not what the Legislature intended. Instead, dissenting Judge Meter explained that MCL 600.2912d(3) was intended:

> ...to provide an exception to the requirement that the affidavit be filed with the complaint in cases where the plaintiff has not been given access to the documents *necessary to prepare an effective affidavit*. In other words, it is unreasonable to apply the 91-day extension under MCL 600.2912d(3) where the defendant has timely given the plaintiff access to medical records sufficient to execute a proper affidavit of merit, even though other records may be outstanding.

Dissenting Opinion at 4.

Judge Meter's conclusion is not an aberration and is consistent with other cases involving similar facts. One such case is Karr v Boodin, Court of Appeals Case No. 256657 (February 9, 2006) (Attachment A) (Defendants' Brief on Appeal, Exhibit 3), in which Plaintiff's

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counsel in this case was the plaintiff's counsel as well. In that case, a unanimous Court of Appeals panel ruled that the plaintiff's access to his medical records was sufficient and did not trigger the 91-day extension under MCL 600.2912d(3), even though the plaintiff did not believe he had received all the medical records within the 56-day period prescribed by MCL 600.2912b(5). As the Court of Appeals concluded, which panel included Judge Meter:

> The purpose of requiring a medical malpractice plaintiff to file an affidavit of merit is to deter frivolous claims. In order to secure an expert witness to file an affidavit of merit, a plaintiff must have access to relevant medical records. By enacting MCL 600.2912d(3), the Legislature afforded a plaintiff who does not receive access to relevant records within the time required by MCL 600.2912b(5) extra time in which to file an affidavit of merit. The purpose of providing an additional ninety-one days to file the affidavit of merit is to deter the medical malpractice defendant from failing to provide a plaintiff's medical records in a prompt and fair manner.
>
> Plaintiff received a copy of defendant's records in December 2002, before he mailed the NOI to Beaumont and defendant. Thus, after that date, he had access to the information that would be needed by an expert witness in order to evaluate the merits of plaintiff's claim. The trial court's application of MCL 600.2912b(5) and MCL 600.2912d(3) was correct. Plaintiff failed to file an affidavit of merit with the complaint as required; therefore, the filing of the complaint did not toll the statute of limitations.

Id at 3 (emphasis added, citations omitted). See also Davis v Botsford Gen Hosp, Court of Appeals Case No. 250880 (May 24, 2005) (Attachment B) (holding that although the plaintiff did not receive "complete" records (i.e., "all medical records") from the defendant, the plaintiff was given access to medical records and the 91-day extension did not apply).

Here, Defendants promptly provided copies of all medical records in their possession to Plaintiff long before the statute of limitations expired. Plaintiff had access to the information his expert needed to evaluate the merits of his claims when he filed his complaint

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in February 2013, as evidenced by the fact that he had the same information then as he did when he finally filed his affidavit of merit in May 2013. If Plaintiff truly thought he did not have sufficient information to file an affidavit of merit, he had other options. He could have filed a motion with the trial court seeking an additional 28 days to file his affidavit of merit under MCL 600.2912d(2). He also could have filed a timely affidavit of merit which, had it been found to be defective, could have been amended. Such amendment would have related back to the original filing. MCR 2.118(D).

But Plaintiff did neither of these things. Instead, Plaintiff gamed the system: he recklessly sat on his rights until the statute of limitations expired, then collaterally attacked the access to records Defendants provided. Plaintiff's reliance upon the exception to the affidavit of merit rule in MCL 600.2912d(3) was at his own peril and the panel majority's decision in the case effectively sanctions such conduct. It is also in conflict with other cases in which such conduct did not toll the statute of limitations, such as Karr and Davis.

What the panel majority did in this case is so far outside the bounds of what MCL 600.2912d(3) allows that the fix is simple: this Court should enter an order vacating its Opinion. In the alternative, this Court should grant leave to make clear that the rule of law is precisely as the Legislature set forth in the statute: only where no access to records is provided is the 91-day extension under MCL 600.2912d(3) triggered.

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II.

THE COURT OF APPEALS ERRED IN DETERMINING THAT DEFENDANTS VIOLATED MCL 600.2912b(5)

A. STANDARD OF REVIEW

A trial court's decision to grant summary disposition is reviewed de novo. Maiden v Rozwood, 461 Mich 109, 118 (1999). This Court also reviews issues of statutory interpretation de novo. Neal v Wilkes, 470 Mich 661, 664 (2004).

B. ARGUMENT

The panel majority erred in finding that Defendants did not comply with MCL 600.2912b(5). Under that statute, a medical malpractice defendant must, within 56 days after receipt of a notice of intent, "allow the claimant access to all medical records related to the claim that are in control of the health professional or facility." (emphasis added). Here, it is undisputed that Defendants mailed all medical records in their control to Plaintiff's counsel on April 23, 2012. Plaintiff's Appeal Brief, Exhibit 3.

With respect to the laboratory results from 1979 through 1992, they no longer exist. Plaintiff's Appeal Brief at 7. They were destroyed pursuant to MCL 333.16213(4), which allows medical records to "be destroyed or otherwise disposed of after being maintained for 7 years." For this reason, the records sought by Plaintiff were not in Defendants' control and Defendants had no obligation to produce them.

The panel majority's determination that Defendants somehow had an obligation to inform Plaintiff of this fact was in error and is another example of it reading language into the statute that is not there. The statute necessitates only that access to medical records in a

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defendant's control be provided, nothing more.

Likewise, there is no merit to the panel majority's contention that Defendants were obligated to provide Plaintiff with access to his billing records. As an initial matter, the panel majority did not inquire as to the location of these records. It assumed, without support, that these records are in Defendants' possession or control. But they are not. Like many medical providers, Defendants use a billing service and the billing records are, therefore, not part of the provider's patient file.

It is for this reason that billing records do not meet the definition of "medical records" under the Medical Records Access Act, MCL 333.26263. Under that statute, "medical records" is defined as "information oral or recorded in any form or medium that pertains to a patient's health care, medical history, diagnosis, prognosis, or medical condition and that is maintained by a health care provider or health facility in the process of caring for the patient's health." The panel majority hangs its hat on the fact that billing records often contain procedure codes, which it argued transforms them into medical records. But diagnosis codes are seldom, if ever, representative of a course of a patient's treatment. They are pre-determined by insurance companies for the sole purpose of providing an amount to bill. They are a financial record, not a medical record, and need not be produced in response to a patient's notice of intent to sue.

RELIEF REQUESTED

The panel majority of the Court of Appeals erred. Its decision should be vacated and the case remanded to the trial court for reinstatement of the trial court's decision granting summary disposition in Defendants' favor. In the alternative, this Court should grant leave to appeal as indicated above.

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By: /s/ Elizabeth A. Favaro

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Dated: March 11, 2015

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EXHIBIT 1

STATE OF MICHIGAN

COURT OF APPEALS

JAMES WADE,

Plaintiff-Appellant,

v

WILLIAM MCCADIE, D.O. and ST. JOSEPH HEALTH SYSTEM, INC. d/b/a HALE ST. JOSEPH MEDICAL CLINIC,

Defendants-Appellees.

UNPUBLISHED
January 29, 2015

No. 317531
Iosco Circuit Court
LC No. 13-007515-NH

Before: K. F. KELLY, P.J., and SAWYER and METER, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right from an order granting defendants summary disposition pursuant to MCR 2.116(C)(7) (action barred by the statute of limitations) after plaintiff failed to provide an affidavit of merit with his complaint, as required by MCL 600.2912d. We conclude that defendants failed to provide plaintiff with his complete medical records, as required under MCL 600.2912b(5) and, as a result, plaintiff was permitted to file the affidavit of merit within 91 days of the complaint under MCL 600.2912d(3). Because an affidavit of merit was filed within those 91 days, plaintiff's action was not time barred. The trial court erred in applying a "substantial compliance" approach to defendants' clear statutory obligation to provide plaintiff with his complete medical records. The logical result of such an approach would empower defendants in medical malpractice actions to pick and choose what information to supply to a plaintiff, even in the face of clear statutory language that access to all medical records be provided. We therefore reverse and remand for further proceedings. In so doing, we make no comment on the merits of plaintiff's claim.

I. BASIC FACTS

Plaintiff alleged that following medical examinations in February 2012, he was advised by his treating doctors that he was suffering from renal and kidney failure as a result of poorly controlled hypertension. According to plaintiff, defendant William McCadie, D.O., his regular doctor, breached his duty of care over a prolonged period by failing to properly manage and treat plaintiff's condition, leading to plaintiff's renal and kidney failure. Plaintiff alleged a series of errors on McCadie's part beginning in 2008. Plaintiff admits that his claim accrued on April 21 or 25, 2011, the date when McCadie should have first been aware of plaintiff's renal dysfunction,

and that he had until April 21 or 25, 2013 to file his claim under the two-year statute of limitations for malpractice actions.

According to plaintiff, he first requested medical records from defendant Hale St. Joseph's Medical Clinic on April 2, 2012. The clinic allegedly prepared a bill for copying plaintiff records on April 23, 2012, which stated, "Records are complete and ready to be mailed." Plaintiff asserts that he paid the requested copying fee on April 26, 2012.

On August 21, 2012, plaintiff's counsel mailed a notice of intent to file suit to defendants St. Joseph Health System and Hale St. Joseph's Medical Clinic and requested access to all of plaintiff's medical records within their control, including billing and payment records, within 56 days under MCL 600.2912b(5). Plaintiff's letter also stated: "Some medical records have already been provided; however, the clinic notes beginning with November 19, 1979, but the laboratory results begin with [1992]. As a result the undersigned would request the entire chart be provided". Plaintiff's counsel also specifically referenced and described the following medical records: blood pressure readings from 1991 through 2011; a fluctuation in "BUN, creatinine, and BUN/creatinine ratio" between 1992 and 2000; creatinine levels from 2008 and 2009; prescriptions for medication from 1992 and 1993; and McCadie's notes through 2012. Also, plaintiff's counsel, using the medical records provided to date, the letter outlines McCadie's failure to control plaintiff's blood pressure, hypertension, and creatinine levels. The letter asserts that plaintiff's acute and prolonged hypertension began in 2008, and that McCadie failed at that time to refer plaintiff to a specialist. Further, the letter asserts that McCadie ignored "ominous" laboratory results in 2011, which made it clear that plaintiff was suffering from significant renal dysfunction.

Plaintiff filed his complaint on February 22, 2013, and on February 28, 2013, submitted a request for production of documents, including all medical and billing records in defendants' control. On May 15, 2013, defendants' counsel sent a letter to plaintiff's counsel, stating the following:

> At our meeting to exchange medical records for the above referenced case on April 24, 2013, you had requested that we look into whether your client's laboratory records for the time period prior to 1992 were available.
>
> Michigan Public Health Code section 333.16213(1) only requires that medical records be retained for a minimum of (7) years, however, we also asked our client to examine their records again to see if the laboratory results were still in existence. Upon information and belief, laboratory results pertaining to [plaintiff] for the time period prior to 1992 no longer exist. Those records were destroyed in a manner consistent with the requirements of Michigan Public Health Code section 333.16213(4).

On May 7, 2013, defendants filed a motion for summary disposition under MCR 2.116(C)(7), arguing that plaintiff failed to provide an affidavit of merit with his complaint as required by MCL 600.2912d. Plaintiff filed a response to defendants' motion for summary disposition on May 28, 2013, along with an affidavit of merit signed by Richard Stern, M.D., who opined, based on a review of plaintiff's medical records, that McCadie's negligent acts and

omissions were the direct and proximate cause of plaintiff's acute renal failure in February 2012. Plaintiff argued that he was permitted to file the affidavit of merit within 91 days of the complaint under MCL 600.2912d(3) because defendants failed to provide him with his complete medical records as they were required to do under MCL 600.2912b(5).

Defendants replied that they mailed plaintiff's counsel all of plaintiff's medical records within their control in April 2011, which is all that is required of them under MCL 600.2912b(5). Defendants also argued that medical records between 1979 and 1992 were not related to plaintiff's malpractice claim, as required under MCL 600.2912b(5), and that plaintiff received enough records to file an affidavit of merit.

At the hearing on defendants' motion, defendants' counsel said she had no knowledge of any records in defendants' possession that were not provided to plaintiff, but that some of his records had been destroyed. The trial court granted defendants' motion on the basis that plaintiff had failed to show that defendant did not comply with MCL 600.2912b(5), explaining as follows:

> All right. Well, I'm granting defendant's motion for summary disposition in this case. I . . . think defendant has complied with the statute, especially considering basically the defendant being able to destroy records that are more than seven years old. Did I say that right? I mean, we have . . . a situation here where plaintiff is, I guess, asking me to find that plaintiff was excused from filing this Affidavit of Merit with the Complaint by that exception, and I just think that plaintiff has failed to show that the exception applies so, therefore, I am granting defendant's motion.

The trial court entered its order granting defendants' motion on June 20, 2013 and entered a final order dismissing the case on August 2, 2013. Plaintiff now appeals as of right.

II. ANALYSIS

This Court reviews de novo the trial court's decision to grant or deny a motion for summary disposition. See *Titan Ins Co v Hyten*, 491 Mich 547, 553; 817 NW2d 562 (2012). "When reviewing a motion for summary disposition under MCR 2.116(C)(7), the trial court must accept the nonmoving party's well-pleaded allegations as true and construe the allegations in the nonmovant's favor to determine whether any factual development could provide a basis for recovery." *Hoffman v Boonsiri*, 290 Mich App 34, 39; 801 NW2d 385 (2010). In the absence of disputed facts, whether a plaintiff's claim is barred by a statute of limitations is a question of law for a court to decide. See *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 230; 561 NW2d 843 (1997).

Under MCL 600.5805(6), a plaintiff bringing an "action charging malpractice" must commence the action within two years after the claim first accrued. Plaintiff admitted below (and does not now contest) that his claim accrued on April 21 or 25, 2011, such that the two-year statute of limitations was set to expire on April 21 or 25, 2013.

Additionally, MCL 600.2912d(1) provides that a plaintiff bringing a malpractice action must file with the complaint an "affidavit of merit," in which a health professional meeting the

requirement of an expert witness certifies, based on the expert's review of the medical records supplied, that the defendant breached the duty of care to the plaintiff and caused the plaintiff to suffer an injury. "[W]hen a plaintiff 'wholly omits to file the affidavit required by MCL 600.2912d(1),' 'the filing of the complaint is ineffective, and does not work a tolling of the applicable period of limitation.' " *Ligons v Crittenton Hosp*, 490 Mich 61, 73; 803 NW2d 271 (2011) (citations and internal quotation marks omitted). "When the untolled period of limitations expires before the plaintiff files a complaint accompanied by an [affidavit of merit], the case must be dismissed with prejudice on statute-of-limitations grounds." *Id.*

There are two exceptions to the requirement in MCL 600.2912d(1) that the affidavit of merit be filed with the complaint. Under MCL 600.2912d(2), a court may, upon motion and for good cause shown, permit a plaintiff to file an affidavit of merit within 28 days after the filing of the complaint. And under MCL 600.2912d(3), an affidavit of merit may be filed within 91 days after the filing of the complaint "[i]f the defendant . . . fails to allow access to medical records within the time period set forth in" MCL 600.2912b(5).[1] MCL 600.2912b(5) gives a defendant 56 days from their receipt of the plaintiff's notice of intent to sue in which to give the plaintiff access to "all medical records related to the claim that are in the control of the health professional or health facility."

Plaintiff did not file an affidavit of merit with his complaint, nor did he file a motion seeking an additional 28 days under MCL 600.2912d(2). Instead, plaintiff argues that his claim is not time-barred under MCL 600.5805(6) because defendants failed to provide him access to all of his medical records within 56 days of receiving his notice of intent to sue under MCL 600.2912b(5), such that his May 28, 2013 affidavit of merit was timely filed within 91 days of his February 22, 2013 complaint under MCL 600.2912d(3). We agree.

Plaintiff specifically requested all of his medical records and billing information from defendant by way of a notice of intent, as well as two follow-up letters. Although defendants provided plaintiff with his medical records dating 1979 to 2012, the records did not include his laboratory test results dated before 1992, nor did they include any billing records. Incredibly, defendants offered absolutely no explanation for their failure to provide plaintiff with these records, despite repeated requests. Nor did defendants permit access to the requested documents. Believing that defendants had not complied with their obligation to provide access to all medical records, plaintiff understood that he had an additional 91 days to file an affidavit of merit, in accordance with MCL 600.2912d(3). Only after plaintiff filed his complaint without the affidavit of merit did defendants offer an explanation for their failure to provide the information. They explained that the laboratory tests dated before 1992 had been destroyed. Defendants continued to offer absolutely no explanation for their failure to provide plaintiff with his billing records. It is only on appeal that defendants now contend that billing records are not "medical records" as that term is defined in MCL 333.26263(i). In the trial court, defendants successfully argued that, even if the records had not been supplied, plaintiff was not excused from filing an

[1] The parties do not dispute that MCL 600.2912d(3) mistakenly refers to MCL 600.2912b(6), instead of § 2912b(5).

affidavit of merit at the time he filed his complaint because, *in defendants' opinion*, plaintiff had "sufficient" information from which to draft an affidavit of merit. Therefore, defendants were rewarded for their gamesmanship. We reject the trial court's approach because it has sent a message to defendants in malpractice actions that they may, without sanction, fail to provide statutorily required information and make their own determination as to what records are relevant to a plaintiff's claim.

The clear and unambiguous language of the statutes at play requires a different result. "The primary goal of statutory interpretation is, of course, to give effect to the Legislature's intent. The focus of our analysis must be the statute's express language, which offers the most reliable evidence of the Legislature's intent." *Badeen v PAR, Inc*, 496 Mich 75, 81; 853 NW2d 303 (2014).

MCL 600.2912b(5) provides that within 56 days of receiving a plaintiff's notice of intent to sue "the health professional or health facility shall allow the claimant access to *all* medical records related to the claim that are in the control of the health professional or health facility." (Emphasis added). MCL 600.2912d(3) permits a plaintiff an additional 91 days after filing the complaint to provide an affidavit of notice "[i]f the defendant in an action alleging medical malpractice fails to allow access to medical records within the time period set forth." The parties agree that MCL 333.26263(i) sets forth the relevant definition of "medical records": "'Medical record' means information oral or recorded in any form or medium that pertains to a patient's health care, medical history, diagnosis, prognosis, or medical condition and that is maintained by a health care provider or health facility in the process of caring for the patient's health."

Under the plain language of § 26263(i), plaintiff's laboratory test results dated before 1992 are clearly medical records that defendants had a duty to produce under § 2912b(5). Plaintiff concedes that records properly destroyed in accordance with the law are not within defendants' control and are, therefore, excused from production. However, even if certain records were not within defendants' control because they had been lawfully destroyed, the reason and explanation for why they were not supplied *were* within defendants' control. Upon receiving the request for records with plaintiff's notice of intent to sue, defendants were obligated to either turn over those records or offer a timely explanation for why they were no longer available. There was no justification or excuse for waiting until after the complaint was filed before investigating why the records were missing and supplying plaintiff with that information.

The plain language of § 26263(i) also compels a finding that patient billing information is part of a patient's medical records. As conceded by defense counsel at oral argument, billing information includes diagnostic procedure codes, dates of testing, and charges for treatment. Plaintiff sought to compare his billing information with the clinical records. Under the broad definition of "medical record", a patient's billing information clearly pertains to the patient's "health care, medical history, diagnosis, prognosis, or medical condition." Again, defendants' novel argument that billing information is not subject to production is made only in this court – it was never raised or addressed by the trial court and merits little discussion.

Defendants nevertheless take a "no harm/no foul" approach. They argue that plaintiff had enough information to prepare an affidavit of merit at the time he filed his complaint.

However, nowhere in § 2912b(5) does it provide that a plaintiff be given access to medical records a *defendant* deems appropriate for a plaintiff to have in order to be able to prepare an affidavit of merit. It simply provides that within 56 days of receiving a plaintiff's notice of intent to sue "the health professional or health facility shall allow the claimant access to *all* medical records related to the claim that are in the control of the health professional or health facility." Although MCL 600.2912b(5) contains the phrase "related to the claim", defendants are not permitted to determine what is relevant, especially in the face of a specific request.[2] Instead, a medical malpractice plaintiff is entitled to either receive or access *all* of his medical records within the defendants' control, including billing information. The trial court erroneously adopted a substantial compliance approach to excuse defendants' statutory obligation.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ David H. Sawyer

[2] We read "related to the claim" to simply exclude those records irrelevant to the potential claim; for example, a medical malpractice case alleging malpractice as to a knee replacement would not include medical records for an uneventful pregnancy and birth occurring five years earlier. Even here, defendants do not contest that the records requested by plaintiff were "related to the claim."

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EXHIBIT 2

STATE OF MICHIGAN

COURT OF APPEALS

JAMES WADE,

Plaintiff-Appellant,

v

WILLIAM MCCADIE, D.O. and ST. JOSEPH HEALTH SYSTEM, INC. d/b/a HALE ST. JOSEPH MEDICAL CLINIC,

Defendants-Appellees.

UNPUBLISHED
January 29, 2015

No. 317531
Iosco Circuit Court
LC No. 13-007515-NH

Before: K. F. KELLY, P.J., and SAWYER and METER, JJ.

METER, J. (*dissenting*).

I respectfully dissent and would affirm.

Plaintiff alleged that following medical examinations in February 2012, he was advised by his treating doctors that he was suffering from renal failure as a result of poorly controlled hypertension. According to plaintiff, defendant William McCadie, D.O., his regular doctor, breached his duty of care over a prolonged period by failing to properly manage and treat his hypertension, leading to plaintiff's renal failure. Plaintiff admits that his claim accrued on April 21 or 25, 2011, the date when McCadie should have first been aware of plaintiff's renal dysfunction.

Plaintiff asserts that he first requested medical records from defendants on April 2, 2012, and defendants assert that they mailed him all the medical records in their possession and control in April 2011. Plaintiff does not dispute that he received medical records pertaining to 1979 to 2012, but contends that the records received did not include his billing records and laboratory-test results from before March 13, 1992.

On August 21, 2012, plaintiff's counsel mailed his notice of intent to file suit and requested access to all plaintiff's medical records within defendants' control, including billing and payment records, within 56 days as provided by MCL 600.2912b(5). Referencing many of

the medical records that had been provided to date,[1] plaintiff's counsel described in detail McCadie's failure to control plaintiff's blood pressure and creatinine levels, asserting that plaintiff's acute and prolonged hypertension began in 2008 and that McCadie failed at that time to refer plaintiff to a specialist. Further, plaintiff's counsel noted that McCadie ignored "ominous" laboratory results in 2011, when it was clear that plaintiff was suffering from significant renal dysfunction. It is undisputed that no additional records were provided to plaintiff within 56 days after defendants received plaintiff's notice of intent to sue.

Plaintiff filed his complaint on February 22, 2013, and six days later submitted a request for production of documents, including all medical and billing records in defendants' control. On May 15, 2013, defendants' counsel sent a letter to plaintiff's counsel, stating that plaintiff's laboratory results from before 1992 had been destroyed in accordance with the Michigan Public Health Code, MCL 333.1101 *et seq.*, which only required that such records be retained for seven years.

On May 7, 2013, defendants filed a motion for summary disposition under MCR 2.116(C)(7), arguing that plaintiff failed to provide an affidavit of merit with his complaint as required by MCL 600.2912d. On May 24,[2] 2013, plaintiff filed an affidavit of merit signed by Richard Stern, M.D., who opined—based on a review of plaintiff's medical records—that McCadie's negligent acts and omissions were the direct and proximate cause of plaintiff's acute renal failure in February 2012. Plaintiff argued that he was permitted to file the affidavit of merit within 91 days of the complaint under MCL 600.2912d(3) because defendants failed to provide him with his complete medical records as they were required to do under MCL 600.2912b(5). Defendants replied that they had already mailed plaintiff's counsel all plaintiff's medical records within their control, which is all that was required of them under MCL 600.2912b(5). Defendants also argued that medical records between 1979 and 1992 were not related to plaintiff's malpractice claim and that plaintiff timely received enough records to file an affidavit of merit. Following a hearing, the trial court granted defendants' motion on the basis that plaintiff failed to show that defendant did not comply with MCL 600.2912b(5), especially considering that defendants were permitted to destroy certain of his records by law.

Plaintiff now argues that the court erred in granting the motion for summary disposition. This Court reviews de novo the trial court's decision to grant or deny a motion for summary disposition. See *Titan Ins Co v Hyten*, 491 Mich 547, 553; 817 NW2d 562 (2012). "When reviewing a motion for summary disposition under MCR 2.116(C)(7), the trial court must accept the nonmoving party's well-pleaded allegations as true and construe the allegations in the nonmovant's favor to determine whether any factual development could provide a basis for recovery." *Hoffman v Boonsiri*, 290 Mich App 34, 39; 801 NW2d 385 (2010). In the absence of

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[1] They included the following: blood-pressure readings from 1991 through 2011; plaintiff's creatinine levels between 1992 and 2000, and 2008 to 2009; prescriptions for medication from 1992 and 1993; and McCadie's notes through 2012.

[2] The record suggests that this document was filed on May 28, but defendants do not dispute the May 24 date for purposes of appeal.

disputed facts, whether a plaintiff's claim is barred by a statute of limitations is a question of law for a court to decide. See *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 230; 561 NW2d 843 (1997).

Under MCL 600.5805(6), a plaintiff bringing an "action charging malpractice" must commence the action within two years after the claim first accrued. Plaintiff admitted below (and does not now contest) that his claim accrued on April 21 or 25, 2011, such that the two-year period of limitations was set to expire on April 21 or 25, 2013.

Additionally, MCL 600.2912d(1) provides that a plaintiff bringing a malpractice action must file with the complaint an "affidavit of merit," in which a health professional certifies, based on a review of the medical records supplied, that the defendant breached the duty of care to the plaintiff and caused the plaintiff to suffer an injury. "[W]hen a plaintiff wholly omits to file the affidavit required by MCL 600.2912d(1), the filing of the complaint is ineffective, and does not work a tolling of the applicable period of limitation." *Ligons v Crittenton Hosp*, 490 Mich 61, 73; 803 NW2d 271 (2011) (citations and internal quotation marks omitted). "When the untolled period of limitations expires before the plaintiff files a complaint accompanied by an [affidavit of merit], the case must be dismissed with prejudice on statute-of-limitations grounds." *Id.*

There are two exceptions to the requirement in MCL 600.2912d(1) that the affidavit of merit be filed with the complaint. Under MCL 600.2912d(2), a court may, upon motion and for good cause shown, permit a plaintiff to file an affidavit of merit within 28 days after the filing of the complaint. Under MCL 600.2912d(3), an affidavit of merit may be filed within 91 days after the filing of the complaint "[i]f the defendant . . . fails to allow access to medical records within the time period set forth in" MCL 600.2912b(5).[3] MCL 600.2912b(5) gives a defendant 56 days from their receipt of the plaintiff's notice of intent to sue in which to give the plaintiff access to "all medical records related to the claim that are in the control of the health professional or health facility."

Here, it is undisputed that plaintiff did not file an affidavit of merit with his complaint and that he did not file a motion seeking an additional 28 days under MCL 600.2912d(2). What plaintiff argues is that his claim is not time-barred under MCL 600.5805(6) because defendants failed to provide him access to all his medical records within 56 days of receiving his notice of intent to sue, such that his May 24, 2013, affidavit of merit was timely filed within 91 days of his February 22, 2013, complaint under MCL 600.2912d(3).

As the Michigan Supreme Court stated in *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002):

> When interpreting statutory language, our obligation is to ascertain the legislative intent that may reasonably be inferred from the words expressed in the

[3] The parties do not dispute that MCL 600.2912d(3) mistakenly refers to MCL 600.2912b(6) instead of § 2912b(5).

> statute. When the Legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself, and judicial construction is not permitted. Because the proper role of the judiciary is to interpret and not write the law, courts simply lack authority to venture beyond the unambiguous text of a statute. [Citations omitted.]

Further, "the provisions of a statute should be read reasonably and in context." *McCahan v Brennan*, 492 Mich 730, 739; 822 NW2d 747 (2012).

In my opinion, plaintiff misreads the plain language of MCL 600.2912d(3). Notably, the statute does not permit a 91-day extension for filing an affidavit of merit where a defendant fails to give the plaintiff access to *all* medical records. Rather, MCL 600.2912d(3) speaks only of the failure to "allow access to medical records," and it only references MCL 600.2912b(5) to the extent of invoking "the time period set forth" therein. Thus, even assuming, for purposes of argument, that defendant violated MCL 600.2912(5) by failing to provide *all* medical records related to the claim, the plain language of MCL 600.2912d(3) does not support the conclusion that such a violation must automatically result in a 91-day extension for filing an affidavit of merit. Moreover, such an interpretation would be unreasonable when read in context with the remainder of MCL 600.2912d. MCL 600.2912d(1) establishes the duty to file an affidavit of merit with the complaint and lists the required contents of the affidavit. Accordingly, it stands to reason that the Legislature intended MCL 600.2912d(3) to provide an exception to the requirement that the affidavit be filed with the complaint in cases where the plaintiff has not been given access to the documents *necessary to prepare an effective affidavit*. In other words, it is unreasonable to apply the 91-day extension under MCL 600.2912d(3) where the defendant has timely given the plaintiff access to medical records sufficient to execute a proper affidavit of merit, even though other records may be outstanding.

Here, plaintiff was able to submit an affidavit of merit using the medical records defendants provided him before he delivered his notice of intent to sue, which began the 56-day period under MCL 600.2912b(5). Accordingly, in my opinion, plaintiff was not entitled to a 91-day extension under MCL 600.2912d(3), and the trial court properly dismissed his claim as time-barred.

I would affirm.

/s/ Patrick M. Meter

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ATTACHMENT A

STATE OF MICHIGAN

COURT OF APPEALS

STEVEN KARR,

Plaintiff-Appellant,

v

STEPHEN E. BOODIN, M.D.,

Defendant-Appellee.

UNPUBLISHED
February 9, 2006

No. 256657
Oakland Circuit Court
LC No. 04-056315-NH

Before: Meter, P.J., Whitbeck, C.J., and Schuette, J.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition and dismissing this medical malpractice case. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

On February 22, 2002, defendant, Doctor Boodin, performed surgery on plaintiff's spinal cord. Subsequently, plaintiff suffered renewed symptoms and underwent further surgery performed by another physician. By letter dated December 14, 2002, plaintiff requested a complete copy of his medical records from defendant. On December 17, 2002, in response to plaintiff's request, defendant forwarded a copy of plaintiff's medical records to plaintiff.

A review of the record reveals that on January 3, 2003, plaintiff mailed a notice of intent (NOI) to file a medical malpractice action against Beaumont Hospital and defendant. The NOI contained a demand for a copy of defendant's records pertaining to his treatment of plaintiff. By letter dated August 18, 2003, plaintiff's counsel informed defendant's counsel that his medical records had not been received. On August 21, 2003, defendant's counsel forwarded a copy of plaintiff's chart to plaintiff's counsel.

On February 20, 2004, plaintiff filed suit against defendant alleging medical malpractice. The complaint was not accompanied by an affidavit of merit as required by MCL 600.2912d(1). The complaint stated that because defendant did not produce his medical records within fifty-six days after being served with the NOI, as required by MCL 600.2912b(5), the affidavit could be filed within ninety-one days after filing the complaint. MCL 600.2912d(3). Plaintiff filed an affidavit of merit on May 19, 2004.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10), arguing that because plaintiff's complaint was not accompanied by an affidavit of merit as required by statute, the filing of the complaint did not toll the statute of limitations. In response to plaintiff's assertions that medical records had not been provided as required, defendant noted that plaintiff had received a copy of his medical records by letter dated December 17, 2002, before defendant received the NOI. Further, defendant stated that plaintiff's counsel had received a copy of plaintiff's chart in August 2003. Defendant's office manager furnished an affidavit in which she stated that on December 17, 2002, three days after receiving plaintiff's request for defendant's records, she sent to plaintiff a copy of defendant's entire chart, the only records under defendant's control. Defendant's office manager further indicated that she received no further correspondence from plaintiff indicating that he or plaintiff's counsel had not received the records. Defendant also argued that plaintiff's complaint was insufficient because it raised issues not stated in the NOI.

The trial court granted defendant's motion. The trial court noted that defendant had furnished the relevant records to plaintiff on December 17, 2002 and that plaintiff had access to the requested records within fifty-six days after the defendant received the NOI. Therefore, plaintiff was not entitled to an additional ninety-one days in which to file an affidavit of merit. The trial court concluded that plaintiff's complaint was time-barred and did not address defendant's remaining arguments.

II. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). We also review issues of statutory interpretation de novo. *Neal v Wilkes*, 470 Mich 661, 664; 685 NW2d 648 (2004). The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mu Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). If the plain and ordinary meaning of statutory language is clear, judicial construction is neither necessary nor permitted. *Cherry Growers, Inc v Agricultural Marketing & Bargaining Bd*, 240 Mich App 153, 166; 610 NW2d 613 (2000).

III. ANALYSIS

The statute of limitations for a medical malpractice action is two years. MCL 600.5805(6). MCL 600.2912d(1) requires a medical malpractice plaintiff to file with the complaint an affidavit of merit signed by a health professional who meets or whom the plaintiff's attorney reasonably believes meets the requirements for an expert witness. The affidavit must contain a statement of the applicable standard of practice, the health professional's opinion that the defendant breached the applicable standard of practice, the actions the defendant should have taken in order to have complied with the applicable standard of practice, and the manner in which the breach of the standard of practice or care was the proximate cause of the alleged injury. If a medical malpractice plaintiff wholly fails to file an affidavit of merit, the statute of limitations is not tolled, and if the limitations period has expired, dismissal of the suit with prejudice is appropriate. *Scarsella v Pollack*, 461 Mich 547, 552-553; 607 NW2d 711 (2000).

A health professional must, within fifty-six days after receiving a NOI, allow the claimant access to all relevant medical records under his or her control. MCL 600.2912b(5). If a

defendant in a medical malpractice action fails to allow access to relevant medical records, the affidavit of merit required by MCL 600.2912d(1) may be filed within ninety-one days after the filing of the complaint. MCL 600.2912d(3).

Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition. He asserts that because defendant did not allow access to relevant records within fifty-six days after receiving the NOI, as required by MCL 600.2912b(5),[1] the clear and unambiguous language of MCL 600.2912d(3) allowed him ninety-one days after filing the complaint in which to file an affidavit of merit.

The purpose of requiring a medical malpractice plaintiff to file an affidavit of merit is to deter frivolous claims. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 47; 594 NW2d 455 (1999). In order to secure an expert witness to file an affidavit of merit, a plaintiff must have access to relevant medical records. By enacting MCL 600.2912d(3), the Legislature afforded a plaintiff who does not receive access to relevant records within the time required by MCL 600.2912b(5) extra time in which to file an affidavit of merit. The purpose of providing an additional ninety-one days to file the affidavit of merit is to deter the medical malpractice defendant from failing to provide a plaintiff's medical records in a prompt and fair manner.

Plaintiff received a copy of defendant's records in December 2002, before he mailed the NOI to Beaumont and defendant. Thus, after that date, he had access to the information that would be needed by an expert witness in order to evaluate the merits of plaintiff's claim. The trial court's application of MCL 600.2912b(5) and MCL 600.2912d(3) was correct. Plaintiff failed to file an affidavit of merit with the complaint as required; therefore, the filing of the complaint did not toll the statute of limitations. *Scarsella, supra*. Summary disposition was correctly granted.

Affirmed.

/s/ Patrick M. Meter
/s/ William C. Whitbeck
/s/ Bill Schuette

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[1] Plaintiff's argument that defendant produced only partial records was not raised in the trial court, and thus is not properly preserved for appeal. *Polkton Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005).

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ATTACHMENT B

STATE OF MICHIGAN

COURT OF APPEALS

CASSANDRA DAVIS, Personal Representative of the Estate of ELSIE BAXTER, Deceased,

Plaintiff-Appellant,

v

BOTSFORD GENERAL HOSPITAL,

Defendant-Appellee.

UNPUBLISHED
May 24, 2005

No. 250880
Oakland Circuit Court
LC No. 2003-049054-NO

Before: Saad, P.J., and Zahra and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant summary disposition pursuant to MCR 2.116(C)(7). We affirm in part, reverse in part, and remand for further proceedings.

I. Ordinary Negligence versus Medical Malpractice

Plaintiff, the decedent's personal representative, filed a negligence action against defendant hospital alleging that defendant's failure to provide adequate and competent care resulted in decedent's death. On appeal, plaintiff first argues that the trial court improperly determined that her claims sounded in medical malpractice.

A. Standard of Review

We review de novo whether the nature of a claim sounds in ordinary negligence or medical malpractice. *Bryant v Oakpointe Villa Nursing Centre*, 471 Mich 411, 419; 684 NW2d 864 (2004).

B. Analysis

Plaintiff specifically identifies the following allegations of her complaint as sounding in ordinary negligence:

> h. The defendant failed to adequately and competently provide proper hygiene for plaintiff's decedent in that defendant failed to bathe plaintiff's

> decedent on a regular basis and failed to properly clean and change her after she soiled herself;
>
> i. The defendant failed to adequately and competently keep plaintiff's decedent's surroundings clean and sterile as necessary for a patient in plaintiff's decedent's medical condition;
>
> j. The defendant failed to adequately and competently change and clean plaintiff's decedent's bed linens and clothes as is necessary for a patient in plaintiff's decedent's medical condition . . . ;

There is no dispute concerning the existence of a professional relationship, thus whether the allegations sound in medical malpractice or ordinary negligence turns on "whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience." *Bryant*, *supra* at 422. In *Bryant*, our Supreme Court addressed whether four claims sounded in ordinary negligence or medical malpractice. The court found that one of the plaintiff's claims, that the defendant "'fail[ed] to assure that plaintiff's decedent was provided with an accident-free environment,'" actually sounded in strict liability. *Id.* at 425-426. The court found that the plaintiff's claim that the defendant "failed to train its staff 'to assess the risk of potential asphyxia,'" sounded in medical malpractice because of the patent need for expert testimony. *Id.* at 428-429. The court then determined that the plaintiff's claim that the defendant is liable for "'[n]egligently and recklessly failing to inspect the beds, bed frames and mattress to assure that the risk of positional asphyxia did not exist for plaintiff's decedent,'" sounded in medical malpractice because "[t]he restraining mechanisms appropriate for a given patient depend upon the risks and benefits of using and maintaining a particular set of restraints in light of a patient's medical history and treatment goals," thus, requiring expert testimony. *Id.* at 429-430. However, the court did find that the plaintiff's claim that defendant "[n]egligently and recklessly fail[ed] to take steps to protect plaintiff's decedent when she was, in fact, discovered on March 1 [1997] entangled between the bed rails and the mattress[,]" sounded in ordinary negligence. The court emphasized that:

> . . . no expert testimony is required here in order to determine whether defendant was negligent in failing to respond after its agents noticed that Ms. Hunt was at risk of asphyxiation. Professional judgment might be implicated if plaintiff alleged that defendant responded inadequately, but, given the substance of plaintiff's allegation in this case, the fact-finder need only determine whether *any* corrective action to reduce the risk of recurrence was taken after defendant's agents noticed that Ms. Hunt was in peril. [*Id.* at 431 (emphasis in original).]

We hold that the trial court properly concluded that the allegations "i" and "j" sound in medical malpractice. Similar to the second, and particularly the third, medical malpractice claims in *Bryant*, those allegations would require assessment of the risks and benefits of the level of sterility and cleanliness needed for a patient "in decedent's medical condition." Thus, expert testimony would be needed to establish the applicable standard of care for a patient "in decedent's medical condition."

However, in regard to allegation "h," we conclude that it sounds in ordinary negligence. Unlike the previous allegations, plaintiff's claim that defendant failed to bathe plaintiff's

decedent on a regular basis, and particularly, in failing to properly clean and change her after she soiled herself, does not require expert testimony. As in the "fail to take steps" claim in *Bryant*, "the fact finder can rely on common knowledge and experience in determining whether defendant ought to have made an attempt to reduce the a known risk of . . . harm to one of its charges." *Bryant, supra* at 431. Further, "no expert testimony is required here in order to determine whether defendant was negligent in failing to respond after its agents noticed" the conditions plaintiff claims existed. *Id.* at 431. While the causation and damages elements of plaintiff's claim may require medical-expert testimony, it is the element of "risk assessment" that is determinative of whether an action sounds in medical malpractice or ordinary negligence, i.e., whether medical judgment is necessary to determine if there was a breach of duty. See *Bryant, supra* at 429-430. Therefore, we conclude that allegation "h" sounds in ordinary negligence.

II. Leave to Amend Complaint

Plaintiff next argues that the trial court should have granted her leave to amend her original complaint. We disagree. This Court reviews for an abuse of discretion a trial court's decision denying a motion to amend a complaint. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). Plaintiff specifically argues that trial court erred by not allowing the complaint to be amended to reflect "that some of her allegations were based on ordinary negligence, not medical malpractice." However, this Court examines "the substance of the underlying tort complaint and the basis for the injuries, rather than simply the nomenclature in the complaint." *AutoClub Group Ins Co v Burchell*, 249 Mich App 468, 481; 642 NW2d 406 (2001). "An amendment to a complaint is futile if it merely restates the allegations already made . . ." *Lane v Kindercare Learning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998). Here, we agree with the trial court that allowing plaintiff to amend her complaint to "clarify" that it was based on ordinary negligence is merely to restate the factual allegations of plaintiff's complaint in a different light. Therefore, the trial court properly denied plaintiff leave to amend her complaint.

III. Extension for Filing Affidavit of Merit

Plaintiff next argues that the trial court should have allowed her an extension to file an affidavit of merit because of defendant's failure to allow her access to the decedent's medical records. We disagree.

A. Standard of Review

The trial court's factual findings are reviewed for clear error. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

B. Analysis

MCL 600.2912d(3) provides that:

> If the defendant in an action alleging medical malpractice fails to allow access to medical records within the time period set forth in section 2912b(6), the affidavit required under subsection (1) may be filed within 91 days after the filing of the complaint.

Here, there was evidence that defendant allowed plaintiff access to the decedent's medical records. An affidavit executed by plaintiff's investigator, Julie Herman, states that she was allowed to review the decedent's medical records at defendant hospital. Plaintiff claims that defendant did not send complete hospital records because of the cost involved. However, MCL 600.2912d does not require defendant to send copies of a plaintiff's medical records, but only requires defendant to "allow access" to medical records. Plaintiff was allowed access, and the trial court's finding with respect to this issue is not clearly erroneous.

IV. Tolling of Statute of Limitation

Plaintiff next argues that the period of limitations should be tolled because plaintiff's status as personal representative was revoked for a period of six months. We disagree.

A. Standard of Review

Plaintiff did not raise this issue below, and it is not preserved for review. *Kosch v Kosch*, 233 Mich App 346, 353-354; 592 NW2d 434 (1999).

B. Analysis

Although this unpreserved issue need not be addressed, *Kosch, supra* at 353-354, we nonetheless conclude that plaintiff failed to establish error requiring reversal. Plaintiff's status as personal representative was revoked because she failed to file an inventory of the decedent's property. First, allowing the period of limitation to be tolled under the circumstances contravenes the express language of that MCL 600.5852, which provides that a personal representative must bring suit "within 2 years after letters of authority *are issued*." (emphasis added.) Moreover, if this Court accepted plaintiff's argument that a personal representative can toll the medical malpractice limitations period by failing to fulfill duties as a personal representative, it would contravene the Legislative intent in establishing a limitations period in MCL 600.5852.

Plaintiff also argues that equitable or judicial tolling is applicable to her medical malpractice claims under *Bryant*. In *Bryant*, our Supreme Court held that where a "[p]laintiff's failure to comply with the applicable statute of limitations is the product of understandable confusion about the legal nature of her claim, rather than a negligent failure to preserve her rights," tolling of the medical malpractice claims is appropriate. *Bryant, supra* at 432.

We conclude that equitable or judicial tolling is not appropriate in this case. Here, plaintiff was aware that the overwhelming majority of allegations listed in her complaint sounded in medical malpractice, not ordinary negligence. Indeed, plaintiff claims on appeal that "[t]he circuit court erred in dismissing the *entirety* of the [p]laintiff's case since there were *some aspects* of plaintiff's [c]omplaint which stated claims based on ordinary negligence, not medical malpractice" (emphasis added). Further, plaintiff filed an "emergency motion for extension of time to file affidavit of merit," in which she asserted that "due to clerical error, the complaint in this matter was filed April 15, 2003 without an affidavit of merit." Apparently, "plaintiff had retained an expert witness, Dr. David Mansfield, who reviewed the available records in this matter and prepared a report on March 22, 2003, well in advance of the filing of the complaint." However, plaintiff nonetheless attempted to file her complaint within the two-year medical

malpractice limitation period, and even attempted to secure a ninety-one day extension under MCL 600.2912d(3), and a twenty-eight day extension under MCL 600.2912d(2), in which to file the affidavit of merit. Under these circumstances, we cannot conclude that the failure to file the affidavit of merit with the complaint was the product of "understandable confusion."

V. Dismissal With Prejudice

Plaintiff next argues that the trial court erred in dismissing her medical malpractice claim with prejudice.

A. Standard of Review

"This Court reviews a circuit court's grant of summary disposition de novo." *Ins Comm'r v Aageson Thibo Agency*, 226 Mich App 336, 340; 573 NW2d 637 (1997). Whether a claim is time-barred is also reviewed de novo. *Id.* at 340-341.

B. Analysis

In *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000), our Supreme Court held that dismissal with prejudice is appropriate in cases where the plaintiff has not filed a complaint with an affidavit within the applicable limitations period. *Id.* at 551-552. In the instant case, the period of limitations expired on May 31, 2003. The trial court granted plaintiff's motion for summary disposition on August 20, 2003. Thus, plaintiff had not filed a complaint with an affidavit within the applicable limitations period, and because the period of limitations is not tolled by a complaint filed without an affidavit of merit, plaintiff's claim was properly dismissed with prejudice. *Id.* at 553. To the extent that plaintiff argues that our Supreme Court's holding in *Scarsella* is incorrect, this Court is nonetheless bound by precedent. *Edwards v Clinton Valley Center*, 138 Mich App 312, 313; 360 NW2d 606 (1984).

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Brian K. Zahra
/s/ Bill Schuette

STATE OF MICHIGAN

IN THE SUPREME COURT

JAMES WADE,

Plaintiff/Appellee,

v.

WILLIAM McCADIE, D.O. and
ST. JOSEPH HEALTH SYSTEM, INC.,
d/b/a HALE ST. JOSEPH MEDICAL CLINIC,

Defendants/Appellants.

S.C. Case No.
C.A. Case No. 317531
L.C. Case No. 13-007515-NH

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NOTICE OF HEARING

PLEASE TAKE NOTICE that the attached Application for Leave to Appeal shall come on for hearing in the Michigan Supreme Court, Michigan Hall of Justice, 925 W. Ottawa St., Lansing, Michigan 48913 on Tuesday, April 7, 2015. Pursuant to MCR 7.302(A)(2), please take notice that the application for leave to appeal will not be argued orally unless previously so ordered in advance by the Court.

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Date: March 11, 2015

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NOTICE OF FILING

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Michigan Court of Appeals
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Lansing, Michigan 48913

NOW COME Defendants/Appellants, and state that on March 11, 2015, an Application for Leave to Appeal has been filed with the Michigan Supreme Court.

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Date: March 11, 2015

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PROOF OF SERVICE

ELIZABETH A. FAVARO states that on March 11, 2015, she did serve, or cause to be served, the following documents:

1. Notice of Hearing;
2. Notice of Filing;
3. Application for Leave to Appeal on behalf of Defendants/Appellants; and
4. Proof of Service

upon:

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via First Class mail, the same being said individuals' last known addresses, and via the court's TrueFiling System, which will send notice of electronic filing to the attorneys of record and interested parties.

I declare that the above statements are true to the best of my knowledge, information and belief.

GIARMARCO, MULLINS & HORTON, P.C.

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